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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 67

NASHVILLE MILK COMPANY,
Petitioner,

vs.

CARNATION COMPANY,
Respondent.

PETITION OF NASHVILLE MILK COMPANY FOR REHEARING.

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Now comes the above named Nashville Milk Company and presents this, its petition for a rehearing of the above entitled cause, and in support thereof shows the following:

I.

Representative Patman's Statement Given in 1950 Is Not an Aid to Construction.

The opinion of the court relies upon the testimony of Rep. Patman given before a House Committee in 1950 in which he stated that Sec. 3 of the Robinson-Patman Act was not an amendment to the Clayton Act.

It is true that Rep. Patman introduced the Patman bill in the House, portions of which were later included in the Robinson-Patman Act. **However the bill that was passed was written by the Conference Committee.** Rep.

Patman was not a member of the Conference Committee. The House members of the committee were Reps. Utterbach, Miller, Celler, McLaughlin, Summers, Guyer and Robinson. (80 Cong. Rec. 8617.)

The Congressional Record shows that despite the clearly expressed intention of certain members of the Conference Committee the day the bill was debated and passed in the House that Sec. 3 was to become part of the Clayton Act (hereinafter more fully discussed), **Rep. Patman who was present did not raise his voice to the contrary.**

Statements of some members of Congress in conflict with statements of the meaning of statutory construction made by members of committees on the floor of the House and Senate are not to be taken as persuasive of Congressional purpose. (*U. S. v. Wrightwood Dairy Co.*, 315 U. S. 110-125, 1941.)

In the case just cited, the court refused to consider statements made by members of the Senate in conflict with statements made by members of the House and Senate committees. There the statements made in the Senate in conflict with the statements of members of the committees were made at the same session of Congress when the bill was being debated, the conflicting statements being made only a few days apart when the bill was fresh in the minds of all.

Here Rep. Patman not only was not a member of the Conference Committee, but the expression of his opinion which the court has relied upon **occurred 16 years after the Robinson-Patman Act was passed.** It is one thing to construe a statute upon the basis of statements made by a member of Congress who participated as a member of a Conference Committee in the preparation of the bill which became the statute. It is something else to construe a statute upon the basis of a statement made by a member of Congress who was not a member of the Conference Com-

mittee that drew the bill. It is also one thing to construe a statute in the light of a statement made by a member of Congress when the bill that was enacted into law was in the process of being debated and fresh in his mind. It is something else to construe it in the light of a statement made 16 years after the debates had terminated and the law had been enacted. That is comparable to admitting in evidence as part of the *res gestae* an utterance made 16 years after the event by one who was only a bystander to the event and not a participant.

II.

Statements Made on the Floor of the House by Members of the Conference Committee Clearly Establish that Sec. 3 of the Robinson-Patman Act Was to Become a Part of the Clayton Act.

At the beginning of Part II of the opinion the Court states that the legislative history of the Robinson-Patman Act shows that the fair conclusions to be drawn from its legislative history is that it was not intended that Sec. 3 was to become a part of the Clayton Act and that such section was to carry only criminal sanctions, except that price discriminations, to the extent they were common to Sec. 3 and Sec. 2 of the Clayton Act, were also understood to carry under independent force of the Clayton Act the private remedies provided in that Act. Later in Part II, the opinion states that "Further excerpts from the legislative history, set forth in the margin, also bear out the conclusions stated at the outset of this part of our opinion." The margin of the opinion then sets forth quotations from the remarks of Representatives Utterbach and Miller when the bill was being debated in the House. We respectfully submit that these quotations taken out of context do not have the interpretation assigned to them by the court.

The reference in the margin of the opinion to Rep. Miller's remarks is as follows:

> "Rep. Miller, a House Manager of the Committee of Conference, later said, 'Sec. 3 is the Borah-Van Nuys amendment * * * The first section of the bill as reported back here amends Sec. 2 of the Clayton Act.' When asked whether Sec. 3 was 'a part of the same act,' Mr. Miller replied (80 Cong. Rec. 9421): '*Of course it is, but it is not a part of the Clayton Act as amended by Sec. 2* (Sec. 1 of the Robinson-Patman Bill.)' (Italics added.)"

In the Appendix B of our original brief (pp. 36-38) we set up in full the remarks in the House of which the foregoing quotations are a part.

These remarks show that Rep. Celler, a member of the Conference Committee, stated without challenge that a violator of Sec. 3 would have to respond in triple damages under the Clayton Act; and Rep. Miller likewise agreed. No member of the House took issue in that respect with either Rep. Miller or Rep. Celler.

The remarks set forth in Appendix B also show that Reps. Massingale and Hancock (not members of the conference committee) were concerned with whether the bill provided for criminal violations for infractions of Sec. 1 of the bill, or whether the criminal penalties were limited to a violation of Sec. 3. It was this discussion which induced the statement by Rep. Miller quoted in the margin of the opinion. Rep. Miller was not called upon to state whether Sec. 1 alone amended the Clayton Act. This is clearly shown by the inquiries to Rep. Miller and his responses which the opinion does not consider in their context. The following (See Appendix B, pp. 38-39 of our original brief) is the full context, with emphasis supplied:

> "Mr. Massingale. Does the bill agreed to by the conferees carry the penalty of triple damages and also a penalty under the criminal law?

Mr. Miller. The penalty of triple damages is the old law. In other words we made no change in that particular provision of the Clayton Act. Section 3, which the gentleman from New York talks about, is the Borah-Van Nuys amendment, and that is the criminal section of this bill. The first part of this bill has nothing to do with criminal offenses. It deals primarily, in my opinion, with the authority of the Federal Trade Commission to regulate and enforce the provisions of Section 2 of the Clayton Act as amended. *Section 3 in the bill is placed in an effort to make the criminal offense apply only to that particular section*, and I believe that is a reasonable construction if you will look at the bill.

Mr. Massingale. There is no criminal offense involved for anything outside of what is contained in that section?

Mr. Miller. In Section 3.

Mr. Hancock of New York. *Is it not perfectly clear that any vendor who discriminates in price between purchasers is guilty of a crime and is also subject to triple damages to any one who claims to be aggrieved?*

Mr. Miller. *That is true, but the criminal part is included in Section 3 and Section 3 only.*

Mr. Hancock of New York. *But is it a part of the same act?*

Mr. Miller. *Of course it is*, but it is not a part of the Clayton Act as amended by Section 2. It ought to be as far as that is concerned, if a seller willfully discriminates."

It is plain from the foregoing that what Rep. Miller stressed was that violations of the criminal provisions were limited to Sec. 3; and that when he stated that Sec. 3 was not a part of the "Clayton Act as amended by Section 2", he meant that **only Sec. 1 of the bill amended Sec. 2 of the Clayton Act**; and that **Sec. 3 of the bill did not amend Sec. 2 of the Clayton Act** or impose criminal sanctions for a violation of Sec. 2. He did not say that Sec.

1 of the bill was the sole amendment of the Clayton Act. Neither did he say either directly or by inference that Sec. 3 did not amend the Clayton Act. If he had any such intention it would have been in direct contradiction of his concession to Rep. Hancock as just given and later to Rep. Celler that a violator of Sec. 3 would be subject to triple damages. (See our original brief, Appendix B, p. 38.) It would have been likewise in contradiction of his later statement in which he asserted, "Mr. Speaker, I want to say that Congress really *wants a bill amending the Clayton Act.*" (See our original brief, Appendix B, p. 38, with emphasis supplied) in which he clearly did not isolate Sec. 1 as the sole amendment of the Clayton Act, **but regarded the entire bill as an amendment to the Clayton Act.**

An examination of the quotation from Rep. Utterbach given in the margin of the opinion in which he stated that Sec. 3 of the bill which imposed criminal penalties did not affect the operation of the "Clayton Act amendment provided for in Sec. 1", gives the same conclusion as those we have just reached from Rep. Miller's remarks. Rep. Utterbach was only stressing what Rep. Miller stressed, namely, that only Sec. 1 of the bill amended Sec. 2 of the Clayton Act; and that the criminal sanctions of Sec. 3 would not be added to a violation of the Clayton Act as amended by Sec. 1.

III.

The Report of the Conference Committee Carries No Evidence that Sec. 3 Was Excluded as an Amendment of the Clayton Act.

The court stresses portions of the Conference Committee report in Part II of the opinion in support of its conclusion previously noted that the legislative history supports the

view the court takes. We respectfully submit that the parts of the report given in italics in the opinion should not be given the construction placed upon them in the opinion.

It is significant that nowhere does the report state that Sec. 3 of the bill was not to become a part of the Clayton Act or exclude it as such an amendment. A reading of the report (80 Cong. Rec. 9414-9415) will disclose that it merely stresses that it is Sec. 1 of the bill that amends Sec. 2 of the Clayton Act and that the amendment to Sec. 2 was obtained by dividing former Sec. 2 into a number of separate paragraphs. The report only emphasizes that Secs. 2, 3 and 4 of the bill are not to be regarded as replacements for what was in Sec. 2 of the Clayton Act. It stresses that only Sec. 1 of the bill was to replace Sec. 2 of the Clayton Act. The report, additionally, harmonizes Secs. 1 and 3 of the bill by pointing out although they overlap in some respects, there was no inconsistency with the provisions of Sec. 2 of the Clayton Act which were to be amended by Sec. 1 of the bill.

Rep. Utterbach opened the debate upon the report with a lengthy explanation of its provisions that extends over 4 pages of the Congressional record (80 Cong. Rec. 9415-9419). Our comments on the report just given are no more than a summary of his explanation.

IV.

The Court's Opinion Failed to Consider Relevant Remarks by Senator Borah.

In view of the fact that the Borah-Van Nuys amendment to the Robinson bill in the Senate (S. 3154) eventually became Sec. 3 of the Robinson-Patman Act (absent its second paragraph only which became Sec. 4 of the Robinson-Patman Act), the remarks of Senator Borah when

he introduced his amendment in the Senate are relevant. They are not referred to in the opinion of the court.

An examination of Senator Borah's remarks (See p. 12 of our original brief) leaves no doubt but that he intended that his amendment should give a party injured by its violation a civil action for damages.

Senator Borah was a Senate member of the Conference Committee. (80 Cong. Rec. 8617.) It is altogether unlikely that a man of his well recognized convictions would have subordinated his amendment in the Conference Committee bill to a provision with criminal sanctions only, at least without a later explanation. As a member of the Conference Committee he participated in the writing of the bill. The Congressional record shows that he was present in the Senate and participated in the discussion when the Conference Committee report was approved. (80 Cong. Rec. 9903.) Nowhere in the record did he state that Sec. 3 did not furnish a civil cause of action to a party injured by a violation of Sec. 3. Had it been the intention of the Conference Committee to cut down Sec. 3 to a provision with criminal sanctions only, it is difficult to believe that Senator Borah would not have explained to the Senate that the section was intended to impose criminal sanctions only and his reasons for agreeing to such a drastic change.

V.

The Very Nature of the Robinson-Patman Act Itself Supports the View that the Entire Act Was an Amendment to the Clayton Act.

The opinion of the court did not consider the strong internal proof furnished by the Robinson-Patman Act itself that the entire act by its very nature was an amendment of the Clayton Act. That it is so is clear from the following analysis:

First: The act consists of 4 sections. Sec. 2 (which preserved pending causes of action under Sec. 2 of the Clayton Act prior to its amendment by Sec. 1 of the Robinson-Patman Act) characterized the act four times as "this amendatory Act." Congress did not limit its characterizing language to any one section. It thus described **the entire act** as one of an amendatory nature.

Second: An act may amend a prior act even though the later act is not stated to be an amendment of the earlier one. A law is amended when something is added to it or taken away to better accomplish its purpose. Supplemental statutes include every species of amendatory legislation which complete a legislative scheme. (See authorities cited pp. 17-18 of our original brief.)

Third: Sec. 4 exempts cooperative associations from the operation of the entire Robinson-Patman Act. Its provisions plainly apply to Sec. 2 of the Clayton Act (as amended by Sec. 1 of the Robinson-Patman Act) **and it therefore clearly amended and became a part of the Clayton Act.** The cooperative exemption (Sec. 4) also plainly applies to Sec. 3, **thus modifying the operation of the latter.** If Sec. 3 did not amend and become a part of the Clayton Act, it would be contrary to ordinary legislative practice. See 4, which is a part of the Clayton Act, would reach out of the Clayton Act and impair and limit the operation of a separate act which was passed in the same bill. If Sec. 3 is not a part of the Clayton Act, then we must go to another act of Congress (the Clayton Act) to find its limits and find there those limits impaired and modified by the cooperative exemption of the Clayton Act.

Fourth: All parts of the Robinson-Patman Act (Sec. 1 forbidding certain acts, Sec. 2 preserving pending actions, Sec. 3 forbidding certain acts and Sec. 4 exempting co-operatives) are integrated parts of a whole. All deal with monopolistic practices of the same general nature in

the sale of goods. All acts forbidden by Sec. 3 except one (selling at unreasonably low prices to destroy competition) are likewise forbidden by Sec. 1. The single act forbidden by Sec. 3 which is not forbidden by Sec. 1 is in the same area as the monopolistic practices forbidden alike by both sections. It would be an anomaly for Congress to have intended to isolate Sec. 3 from the Clayton Act for the sole reason that a single provision in the latter **(akin although not identical to the forbidden provisions in Sec. 1)** is not to be found in Sec. 1.

VI.

There Is Nothing Inconsistent Between the Title of the Robinson-Patman Act and the Amendment of the Clayton Act by Sec. 3.

It is entirely consistent for Congress to have intended that Sec. 3 should amend and become a part of the Clayton Act regardless of the title employed professing to be an Act "To amend section 2 of (the Clayton Act) * * * *and for other purposes.*" The "other purposes" were plainly for the purpose of adding the three additional sections to the Clayton Act which are found in the Robinson-Patman Act. The express reference in the title to the amendment of one named section of the Clayton Act (Sec. 2) would not exclude the intention of Congress of *adding* the three additional sections by way of amendment. Nothing in the phrase "other purpose" excludes the purpose of adding three additional sections. From the reading of the title in conjunction with the body of the act it is clear that Congress had two purposes. One was to make a direct amendment of Sec. 2 of the Clayton Act. The other was to add by way of amendment the three additional sections. Any other construction of the title would exclude the addition to the Clayton Act by way of amendment of not

only. Sec. 3 of the Robinson-Patman Act but Secs. 2 and 4 as well. The intention of Congress of adding all three additional sections to the Clayton Act is well within the framework of the phrase "other purposes."

For the foregoing reasons, it is respectfully urged that this petition for rehearing be granted and that the judgment of the Court of Appeals, 7th Circuit, upon further consideration be reversed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I, Jerome F. Dixon, counsel for the above named petitioner, Nashville Milk Company, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

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